IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.3436 OF 2006

Neeta Tikam Nariani ...Applicant
vs.

1.The State of Maharashtra
2.Saju Ramchand Kimatrai ...Respondents

WITH
CRIMINAL APPLICATION NO.3437 OF 2006

Neeta Tikam Nariani ...Applicant
vs.
1.The State of Maharashtra
2.Smt.Minal Deepak Roopchand ...Respondents

Mr.A.H.H.Ponda for the Applicant
Mr.A.S.Shitole,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : SEPTEMBER 27,2006.

ORAL JUDGMENT:

1. I have heard Shri Ponda appearing for the Applicant. The controversy involved in both these Applications is the same and therefore, I am referring the facts of the case in Application No.3436 of 2006. The second Respondent is the complainant in a complaint under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act). The complaint was filed by the second Respondent through her Constituted Attorney one Ramchandra S. Kimatrai. According to the case of the Applicant, the said Constituted Attorney has no personal knowledge regarding the transaction which is subject matter of the complaint. The Applicant who is arraigned as an accused in the said case made an application for dismissal of the complaint on the ground that the second Respondent has not stepped into witness box and the second Respondent has examined the Constituted Attorney. Another application was made by the Applicant under section

311 of the Code of Criminal Procedure, 1973 for issuing witness summons to the first Respondent-complainant. The said application was rejected by the learned Metropolitan Magistrate by order dated 15th April 2006. The application made by the Applicant for dismissal of the complaint was also rejected by the learned Metropolitan Magistrate. A Revision Application was filed before the Sessions Court which has been rejected on merits.

2. Shri Ponda the learned Counsel for the Applicants placed reliance on the decision of the Apex Court in case of Zahira Habibulla H. Shaikh Vs. State of Gujrat [II (2004) C.C.R. page 187 (SC)]. Placing reliance on the said decision he submitted that as the Applicant is made to face trial for such a long time, power under section 311 has to be exercised for the purpose of examining the complainant so that truth can be come out before the Court. He also invited my attention to the decision of the learned Single Judge in case of Mamtadevi Prafullakumar Bhansali Vs. Pushpadevi Kailashkumar Agrawal and another [All M.R. (Cri) page 3075]. He submitted that in the present case, it was incumbent on the second Respondent to enter the witness box in view of the law laid down by the learned Single Judge in case of Mamtadevi (supra). He submitted that the drawing adverse inference for non examination of payee is not enough and the court must exercise the power under section 311 of the said code for summoning the payee for recording her evidence.

3. I have considered the submissions. The reliance has been placed on paragraph 44 of the decision of the Apex court in case of Zahira (supra) said paragraph reads thus:

"44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. the section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal V. Union of India 1991 Supp (1) SCC 271, this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any court', 'at any stage', or 'any enquiry of trial or other proceedings' 'any person' and 'any such person' clearly spells out that the section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates

> and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of just decision and to uphold the truth."

4. The submission of Shri Ponda, learned Counsel for the Applicant is that it is the duty of the Criminal Court to exercise power under section 311 for the purpose of aid of just decision to uphold the truth. According to him it is irrelevant whether the evidence of a particular witness will support the prosecution case or the defence. He submitted that the Applicant has been forced to face the trial for such a long time. The Trial Court should have exercised power under section 311 by summoning the original complainant.

5. The Revisional Court has held that if the second

Respondent has taken the risk of examining her Constituted Attorney who has no knowledge about the facts of the case, the prosecution may fail and will result into acquittal of the Applicant. In the present case, we are dealing with the case under section 138 of the said Act. It will be necessary to refer to the decision of the Apex court in case of Dalmia Cement (Bharat) Ltd. Vs. Galaxy Traders and Agencies Ltd. [(2001) 6 S.C.C. page 463). In paragraph 3 of the said decision the Apex Court has held thus :

"3. The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one

hand to another. **To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, let it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.**" (Emphasis supplied)

6. The test laid down by the Apex Court is that the provisions of section 138 and other connected sections of the said Act are required to be interpreted in the light of the objects intended to be achieved. The Apex Court itself has noted that the said provision makes a deviation from the general law. In paragraph 4 of the said decision, the Apex Court while dealing with section 138 of the said Act made it clear that a civil transaction has been made an offence by fiction of law. Therefore, if such applications under section

311 of the said Code are allowed for compelling the complainant to enter the witness box, it will amount to defeating the objectives of the law.

7. So far as the filing of complaint under section 138 of the said Act by a Constituted Attorney is concerned, the law laid down in the case of Mamtadevi is very clear. If the law requires the second respondent-payee to step into witness box for establishing the ingredients of the offence and if the second Respondent chooses not to appear, the legal consequences will follow. Considering the legislative intent, it will not be appropriate for the court to pass an order in each and every complaint under section 138 of the said Act for compelling the payee to enter into the witness box. Wherever the payee has taken a risk of not entering the witness box, it will be always open for the Court to draw an adverse inference against him. The decision of the Apex Court in case of Zahira (supra) will not help the Applicant.

8. In my view, the learned Trial Judge was right in rejecting the application made by the Applicant. There is no merit in the Applications and the same are rejected.

9. It is, however, made clear that the nothing stated in this order will be construed as an expression of opinion on the merits of the pending complaints and all contentions of the parties on merits are expressly kept open.

JUDGE